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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.——, Original

STATE OF LOUISIANA, *Plaintiff,*

vs.

CLAUDE CUMMINS, ET AL., *Defendant.*

PETITION FOR REHEARING

And now into Court comes the State of Louisiana, and moves this Honorable Court to grant a rehearing herein on the ground that this Court erred in the *"per curian"* rendered in this case on October 27, 1941, because:

1. The United States Supreme Court possesses no discretion either under Article III, Section 2 of the United States Constitution, or under Section 233 of the Judicial Code, to deny Louisiana, one of the United States of America, leave to invoke the original jurisdiction of this Court under the circumstances of this case, where such original jurisdiction is otherwise properly invoked.

2. That this case is distinguishable from the case of *Massachusetts v. Missouri*, 308 U. S. 1, 19-20,

and the decision in that case is not controlling in the present case.*

3. In the alternative, and only in the event that the Court should find that *Massachusetts v. Missouri*, 308 U. S. 1, 19-20, is controlling, then the State of Louisiana asks for a reconsideration thereof, and suggests that *Massachusetts v. Missouri* is in error, and should be overruled or restricted.*

WHEREFORE, the State of Louisiana now prays that this Honorable Court grant a rehearing herein, and after full consideration, distinguish, or, and only in the alternative, overrule, *Massachusetts v. Missouri, 308 U. S. 1, 19-20*, and grant the original motion of the State of Louisiana for leave to file the proposed complaint, as amended, in the above numbered and entitled cause, and the other relief prayed for in such original motion.

The State of Louisiana further prays that the Court certify to the Attorney General of the United States, under the provisions of the Act of Congress of August 24th, 1937, Chapter 754 (50 Stat. 751), that the constitutionality of an Act of Congress, to-wit, the Judiciary Act (Judicial Code, Section 233, 28 U. S. C., § 341), being an Act affecting the public interest, is here drawn in question in a proceeding to which neither the United States, nor any agency thereof, nor any officer or employee, as such officer or employee, is a party.

And the State of Louisiana further prays that in view of the public importance of the issues to be decided, and of the sovereign nature of the States whose interests will

*See *West Coast Hotel Co. v. Parrish*, 300 U. S .379 (1937) and *cf. Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936).

be affected by the decision on this motion, that this Court exercise its discretion under Rule 33 to permit oral argument thereon.

EUGENE STANLEY,
Attorney General, State of Louisiana.

JAMES J. MORRISON,
Special Assistant Attorney General,
State of Louisiana.
Executive Counsel, Louisiana Crime Commission

CERTIFICATE

I, the undersigned counsel for the State of Louisiana, do hereby certify that this petition for rehearing is presented in good faith, and not for the purpose of delay.

JAMES J. MORRISON.

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.——, Original

STATE OF LOUISIANA,

Plaintiff,

versus

CLAUDE CUMMINS, ET AL.,

Defendant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

STATEMENT

The State of Louisiana filed a motion with this Honorable Court for leave to file an original complaint in the Supreme Court, within the original jurisdiction of the Supreme Court as provided for by Article III, Section 2 of the Constitution of the United States. The complaint exhibited with the motion, disclosed that the State of Louisiana sought to pursue its action against certain named individual and corporate defendants in this Court to rescind a contract alleged to have been procured by means of a fraudulent conspiracy among the defendants, with an agency of the State of Louisiana, and to recover back the money out of which the public fisc of Louisiana was alleged to have been defrauded. The Court first denied Loui-

siana leave to file the proposed complaint for want of jurisdiction, because it appeared that one of the named parties defendant was a citizen of Louisiana. Thereupon, Louisiana moved to amend its complaint and to strike the citizen of Louisiana as a defendant, and petitioned this Court for a rehearing on the ground that the jurisdictional defect noted by the Court had been cured, as all of the remaining defendants were citizens of states other than Louisiana. Thereupon this Court, on October 27, 1941, entered the following order:—

> "*Per curiam:* The motion to strike Abraham L. Shushan, the citizen of Louisiana, as a party defendant is granted. The petition for rehearing is granted. Leave to file the complaint is denied. *Massachusetts v. Missouri*, 308 U.S.1, 19-20."

Reference to *Massachusetts v. Missouri*, 308 U.S.1, at pages 19 and 20, discloses that the Court, in denying Louisiana permission to file its complaint against Cummins and others, relied upon the language in the *Missouri* case to the effect that this Court may, "in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum," and apparently concluded that New York provided a "suitable forum" in which Louisiana may pursue its complaint against the defendants, for Louisiana is not entitled to sue in any Federal Court other than the Supreme Court.[1]

It must be pointed out at the outset, that Louisiana, in the complaint that she proposes to file in this Court, is not seeking an adjudication upon any novel question of law or

[1]See *Wisconsin v. Duluth*, 2 Dill. 406, Fed. Cas. #17902 (1872) and cases there cited. See also the original jurisdiction of the District Courts, Judicial Code § 24, 28 U. S. C. § 41.

in a type of litigation not already well known to the framers of the Constitution at the time of its adoption.[2] Louisiana's is a typical case of recission of a contract for fraud in the procurement, and for the recovery back of money out of which she was defrauded—a type of action well known to the common law at least since the inception of the Court of Equity in England, and fully understood in America in 1789. It cannot be said, then, that the original jurisdiction of the Supreme Court was created without Louisiana's complaint in view.

Under the circumstances above outlined, Louisiana feels called upon to ask for a rehearing on the decision announced by the Court in its "Per curiam" in this case on October 27, 1941, because of the momentous nature of the question of fundamental constitutional law there decided, the importance of which transcends the particular controversy between Louisiana and Cummins which the Court by that decision exercised a discretion to decline to permit Louisiana to litigate before its bar. Simply stated, the question raised is as follows:—

> Does the United States Supreme Court, under Article III, Section 2 of the Constitution of the United States, and Section 233 of the Judicial Code, have an absolute discretion to refuse to permit States to invoke its original jurisdiction in a controversy with citizens of other States where such original jurisdiction is otherwise properly invoked.

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[2]The type controversy presented in *Massachusetts v. Missouri* (i. e. the effect of reciprocal statutes placing an inheritance tax on intangibles based on the domicile of the deceased) was unheard of in 1789.

Indeed, the question may properly be put more broadly, because the constitutional provision with respect to the original jurisdiction of this Court in suits by States against citizens of other States is identical with that relating to controversies between States and to cases affecting Ambassadors, other public Ministers and Consuls. The Constitution provides:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction."

Therefore, the basic question involved may be stated as follows:—

> Is the exercise of the entire original jurisdiction imposed upon the Supreme Court by Article III, Section 2 of the United States Constitution, and Section 233 of the Judicial Code, when properly invoked, within the absolute discretion of the Supreme Court so that the sovereigns and sovereign representatives mentioned therein invoke the original jurisdiction of this Court as a matter of grace, rather than as a matter of right?

This question must be considered not only in view of Article III, Section 2 of the Constitution, but in view of Section 233 of the Judicial Code[3] as well, which provides that,

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a

[3] 28 U. S. C. § 341.

> State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against Ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."[4]

The Per curiam decision rendered in this case suggests that the original jurisdiction of this Court is exercised as a matter of grace, rather than as a matter of right. It is respectfully submitted that this conclusion can be supported, neither by a textual construction of the Constitution nor of the Judiciary Act, neither by an appeal to the intention of the Founding Fathers nor by the contemporaneous interpretation and understanding of the Constitution, nor by the prior jurisprudence of this Honorable Court. Indeed, measured by all of the criteria available for the interpretation of constitutional provisions, the inevitable and only conclusion is that Article III, Section 2 of the Constitution gives, and was meant to give, to the States and to the other mentioned parties, a constitutional right to invoke the original jurisdiction of the Supreme Court which, when appealed to

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[4]It is, of course, obvious that an Act of Congress can neither enlarge nor restrict the original jurisdiction of the Supreme Court, *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). The congressional purpose providing that the original jurisdiction of the Supreme Court should be "original, but not exclusive" in certain cases was to permit the parties mentioned to institute original proceedings in other courts having original jurisdiction, i. e., in State courts or in inferior Federal Courts where authorized by Congress. See Hughes, *Federal Practice Jurisdiction and Procedure* (1931), Sec. 3027; *Wisconsin v. Duluth*, 2 Dill. 406, Fed. Cas. #17902 (1872). See also *infra* note 23.

in a proper case, must hear and determine the litigation thus properly brought before it.

I. TEXTUAL CONSTRUCTION OF THE CONSTITUTION

In the first place, it must be noticed that the words of the distributive clause of the Article of the Constitution providing the judicial power are mandatory, and not permissive, thus negating any idea of the permissive or discretionary exercise of original jurisdiction by the Court, or that its exercise is a matter of grace. ". . . in those [cases] in which a State shall be Party, the Supreme Court *shall* have original jurisdiction"[5]—not "*may* have original jurisdiction." Moreover, and even more important to show that the original jurisdiction of the Supreme Court is not a matter of grace, *the very next sentence of the distributive clause of the Constitution provides for a discretionary exercise of the appellate jurisdiction of the Supreme Court.* This sentence provides[6]

> "In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations, as the Congress shall make.*"

The juxtaposition of these two provisions distributing the jurisdiction of the Supreme Court shows four things conclusively—

1. That the Founding Fathers clearly had in mind a discretionary exercise of the jurisdiction of the Supreme Court.[7]

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[5]Emphasis added.
[6]Art. III, Section 2.2. Emphasis added.
[7]See discussion of deliberations of the Constitutional Convention *infra.*

2. That where it was the intention of the Constitution to create a discretionary jurisdiction of the Supreme Court it clearly and unequivocally so stated.

3. That it was the obvious intention to establish a discretion only with regard to the appellate jurisdiction of the Supreme Court.

4. That where it vested a discretionary jurisdiction, it vested the discretion, not in the Court, but in the Congress.

From this, one is irresistably driven to the conclusion that the Constitution did not intend to, and does not, make the original jurisdiction of the Supreme Court discretionary with the Court. In order to permit a discretionary exercise of original jurisdiction by the Court with textual consistency, the Constitution would have to be interpolated to read:—

> In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction, *with such Exceptions, and under such Regulations, as the Court shall make.*

Such a drastic change in the meaning and intent of the Constitution is entirely outside the scope of what Mr. Justice Holmes so aptly called "interstitial legislation" as being within the proper provience of the judicial process. Rather is one reminded of the poignant words of President Washington where, in his *Farewell Address* he warns that

> "If, in the opinion of the people, distribution or modification of the constitutional powers be in

> any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Consistently with the Constitution, the Congress has provided[8] that

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except . . . between a State and citizens of other States . . . in which latter cases it shall have original, but not exclusive, jurisdiction."

The language of this provision conferring original jurisdiction on the Supreme Court is identical with the language of the other provisions of the Judicial Code conferring original jurisdiction on the Federal District Courts in the various categories of cases.[9] Hence if it be said that this Act confers only a discretionary original jurisdiction on the Supreme Court, then the original jurisdiction of the Federal District Courts must be equally discretionary, which is patently inacceptable. Moreover, it would interpolate the Judicial Code to read:

> The Supreme Court shall have, *but need not exercise*, exclusive jurisdiction . . . etc.

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[8]Judicial Code § 233; 28 U. S. C. § 341. This is substantially the same as the provision appearing in the original Judiciary Act.

[9]*Supra* note 1.

a result certainly not to be presumed.[10] Hence if permission to invoke the original jurisdiction of the Supreme Court is actually a matter of grace with the Court, the section of the Judicial Code imposing original jurisdiction upon the Court as of right must be unconstitutional as enlarging the original jurisdiction of the Supreme Court.[11] It is the position of Louisiana, however, that Section 233 of the Judicial Code does not enlarge, but constitutionally prescribes, the original jurisdiction of the Supreme Court as imposing thereon a mandatory original jurisdiction where such jurisdiction is properly invoked by a State in a case against citizens of other States.

II. CONTEMPORANEOUS INTERPRETATION OF THE CONSTITUTION

Turning now to discover the contemporaneous understanding of the meaning of the constitutional provision here involved, it is found that the universal understanding was that the original jurisdiction of the Supreme Court should be exercised by the Court without any question of discretion or of grace entering into the discussion, though the discussion of the validity and extent of the Congressional discretion with relation to the appellate jurisdiction of the Supreme Court was great and often even acrimonious.[12] The most usual and most reliable sources from which to gather the contemporaneous understanding of the meaning of the Constitution are the following:—

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[10]The difficulties with regard to Ambassadors, etc., will be adverted to *infra*, under the title "*V. Effect of a Discretionary Original Jurisdiction.*"

[11]*Marbury v. Madison*, 1 Cranch 137 (1803).

[12]See, for instance, the debate concerning the appellate jurisdiction of the Supreme Court over facts (Hamilton, Federalist #83) and with regard to the review of State court decisions. *Cohens v. Virginia*, 6 Wheat. 264 (1821).

1. The Intention of the Founding Fathers

It can clearly be seen from the *Federalist* and from the proceedings of the Constitutional Convention that the intention of the Founding Fathers was not to place a discretionary original jurisdiction in the Supreme Court in the matters affecting the high sovereign parties who were given recourse thereto by the Constitution. Indeed, one of the plans suggested in the Convention contemplated a discretionary jurisdiction of the Court with regard to suits concerning States, but the discretion was to be assigned, not to the Court, but to Congress. However, this plan was abandoned in favor of placing an absolute original jurisdiction in the Supreme Court with regard to the high sovereign parties named, and a discretionary appellate jurisdiction in the Court in the other cases enumerated subject to a congressional discretion.[13] Hamilton, for instance had the following to say with regard to the necessity of a Federal jurisdiction in general, and of an original jurisdiction in the Supreme Court with regard to the controversies of Ambassadors, Ministers and States in particular:—

> "The power of determining causes between two States, between one State and the Citizens of another and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the

[13]See Randolph's draft, as supplemented in Rutledge's handwriting, referred to in Warren, *The Making of the Constitution* (1929) 534 *et seq.* See also p. 329.

tranquility of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.[14]

"The Supreme Court is to be invested with original jurisdiction, only 'in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party'. Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nation to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."[15]

It can be seen from the above quotation[16] that the Founding Fathers considered Ambassadors, Ministers, Consuls and States as a unity, and, because of their character, and because of the public considerations involved, granted all on the same basis an equal privilege to invoke the original jurisdiction of the Supreme Court as a matter of right belonging to their station.

2. The State Conventions

The deliberations at the State Conventions called to ratify the proposed Constitution often give an important

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[14] *The Federalist*, #80.
[15] *Op. cit. supra*, #81. Emphasis *not* added.
[16] See also the quotation immediately following from Luther Martin, also a member of the Convention.

insight into the contemporaneous understanding of the document. The following quotation is chosen because the author, Luther Martin, uses the most inconsequential illustration to high-light the extent of the original jurisdiction of the Supreme Court:[17]

> "Should any question arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the first instance to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of dispute."

Certainly Luther Martin's "Genuine Information" contemplates no discretionary exercise of the original jurisdiction of the Supreme Court as a matter of grace "however trifling the subject of dispute"!

3. The Judiciary Act

It is well known that many of those who signed the Constitution were members of the first Congress, and the proceedings of this Congress in placing that instrument into operation are particularly significant as to its meaning. This is particularly true of the Judiciary Act of 1789, prepared largely by Ellsworth, putting the judiciary articles of the Constitution into effect.[18] This Act was preceded by long and careful deliberation,[19] and contains the following provision with regard to the original jurisdiction

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[17]Luther Martin, *"Genuine Information"* on the proposed Constitution to the Maryland Legislature. III Ferrand, *"The Records of the Federal Convention"* 220.

[18]See *Ames v. Kansas*, 111 U. S. 449, 463 (1884); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511 (1898) p. 517.

[19]See Gales, *Annals of Congress*, Vol. 1, p. 782, 796, 820.

of the Supreme Court, identical except for the jury-trial provision to the Act as it exists today.

> "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."

This unambiguous assignment of original jurisdiction in suits by States against citizens of other States by the first Congress to the Supreme Court, which has been preserved in substantially identical language and relied upon by the States to the present day, is totally inconsistent with a discretion in the Court to refuse to exercise original jurisditcion. If the original jurisdiction of the Supreme Court is a matter of grace, it is only because the above-quoted Act of Congress is unconstitutional.

It has already been pointed out above that Congress used the identical language in describing the extent of the jurisdiction of the Supreme Court as was used with regard to the jurisdiction of district courts. In the Judiciary Act

of 1789 the provision with regard to the district courts read[20]

> "That the district courts shall have, exclusively of the courts of the several States, cognizance[21] of all . . . "

while that regarding the Supreme Court read[22]

> "That the Supreme Court shall have exclusive jurisdiction of all . . . "

It certainly cannot be presumed that Congress intended to give the district courts a discretionary jurisdiction by this statute, and it is equally obvious that Congress intended to impose a non-discretionary original jurisdiction upon the Supreme Court as well in cases where a State is a party. At least this has been the uniform interpretation of that provision.[23]

4. Early Supreme Court Decisions

Of equal importance in discovering the contemporary understanding of the Constitution are the early decisions of the United States Supreme Court. In this respect the decision of this Court in *Chisholm v. Georgia*[24] is of the utmost importance, not for its holding,[25] but in demonstrating, not only that it never occurred to the Justices that

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[20]§§ 9, 10. As to Circuit Courts, § 11.
[21]The word "cognizance" was subsequently changed to "jurisdiction".
[22]§ 13.
[23]Perhaps a word should be said about the phrase "it shall have original, but not exclusive, jurisdiction" of suits between a State and citizens of other States. The purpose of this provision is adequately explained in *Ames v. Kansas*, 111 U. S. 449, 464 (1884) and *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 519 (1898) as giving the State—*NOT* the Court—a choice as to in which of possible available courts she shall sue. See also *supra* note 4.
[24]2 Dall. 419 (1793).
[25]See XI Amendment.

their original jurisdiction in a suit concerning a State and a citizen of another State could be discretionary and exercised as a matter of grace, but that they all assumed and acted upon the theory that when their original jurisdiction was properly invoked they must decide the case and pronounce and execute judgment, even to the extent of levying execution against a recalcitrant sovereign State. If ever a case was presented for a discretionary refusal to exercise original jurisdiction, if such discretion existed, that of Chisholm against Georgia was such a case. Arising at a time when States-Rights feeling ran high—when even the Federalist papers, of which Chief Justice Jay was co-author, had denied the jurisdiction of the Supreme Court to entertain suits against States without their consent,[26] yet the majority of the Court felt obliged under the Constitution to hear and pronounce judgment on the case. In the course of the opinion Mr. Justice Blair said[27]

> "It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution, because it would be a refusal to take cognizance of a case *where a State is a party.*"[28]

Mr. Justice Wilson observed:[29]

> "This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be a *sovereign.*
>
> 'The judicial power of the United States shall extend to controversies, between a *State* and *citi-*

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[26]*Federalist Paper* #81, attributed to Hamilton.
[27]*Chisholm v. Georgia*, 2 Dall. 419 (1793) at p. 451.
[28]Emphasis *not* added.
[29]*Op. cit. supra*, p. 453, 466.

zens of *another* State'. Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriate language, describe, with more precise accuracy, the cause now depending before the tribunal?"

Mr. Justice Cushing said[30]

"The judicial power, then, is expressly extended to *controversies between a State and citizens of another State.*" When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution . . . One design of the general Government was for managing the great affairs of peace and war and the general defense, which were impossible to be conducted, with safety, by the States *separately.* Incident to these powers and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, States at home and their citizens and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them. So, also, with respect to controversies between a State and citizens of another State (at home). Comparing all the clauses the remedy is reciprocal; the claim to equal justice. As controversies between State and

[30]*Op. cit. supra*, p. 467.

> State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship."[31]

Chief Justice Jay observed:[32]

> "That it is conceded that a state may appear in this Court as Plaintiff against a single citizen as Defendant; and the truth is, that the State of Georgia is at this moment prosecuting an action in this Court against two citizens of South Carolina (Georgia v. Brailsford)."

Even Mr. Justice Iredell, the lone dissenter in *Chisholm v. Georgia*, while insisting that the case did not come within the original jurisdiction of the Supreme Court, nevertheless, repudiated any idea that the Court had a discretion in permitting the exercise of its original jurisdiction. Indeed, Mr. Justice Iredell conceived, and not without authority,[33] that a discretion rested in Congress to define, within the limits of the Constitution, the limits of the original jurisdiction of the Supreme Court, and that Congress, while extending it to suits by States against citizens of other States,[34] had withheld original jurisdiction in suits against States. Mr. Justice Iredell said:[35]

> ". . . the whole business of organizing the Courts, and directing the methods of their proceedings where necessary, I conceive to be in the direction of *Congress*. If it shall be found on this occasion, or on any other, that the remedies now

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[31] Emphasis *not* added.
[32] *Op. cit. supra*, p. 473.
[33] See *supra* "*I. Intention of the Founding Fathers.*"
[34] *I. e.*, in the Judiciary Act, now § 233 of the Judicial Code, *supra*.
[35] *Op. cit. supra* note 27, p. 433. Emphasis *not* added.

> in being are defective, for any purpose it is their duty to provide for, they no doubt will provide others. It is their duty to *legislate* so far as is necessary to carry the Constitution into effect. It is *ours* only to *judge*. . . . There is no part of the Constitution that I know of, that authorizes this Court to take up any business where they left it. . .
>
> "If therefore, this Court is to be (as I consider it) the organ of the *Constitution and the law*, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an *officina brevium*, or take any other short method of doing what the Constitution has chosen (and, in my opinion, with the most perfect propriety) should be done in another manner."

The above quotations make it perfectly clear that at least the first Supreme Bench under the Constitution did not understand their original jurisdiction in suits where a State is a party to be discretionary,[36] and indeed, where the Court exercised what Mr. Justice Iredell thought to be a discretion to enlarge their original jurisdiction, the people were prompt to repudiate the exercise thereof by the adoption of the XI. Amendment.[37]

III. JURISPRUDENCE SINCE CHISHOLM V. GEORGIA

Except so far as the sueability of a State is concerned,[38] the understanding and interpretation of the effect

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[36]See Amendment XI.

[37]See also *Oswald v. New York*, 2 Dall. 401, 402, 415 (1792); *Vanstophorst v. Maryland*, 2 Dall. 401 (1792); *Georgia v. Brailsford*, 2 Dall. 402, 415 (1792); 3 Dall. 1. And see also Note, 2 Dall. 430.

[38]See Amendment XI.

of the provisions of the Constitution and of the Judiciary Act providing the original jurisdiction of the Supreme Court has remained unchanged. Indeed, it may safely be said that, until *Massachusetts v. Missouri*,[39] it had never been doubted that, upon a justiciable controversy properly presented and falling within the original jurisdiction of the Court, each of the United States, and every Ambassador, Minister and Consul was entitled, under the terms of Article III, Section 2 of the Constitution and Section 233 of the Judicial Code, to invoke the original jurisdiction of the Supreme Court and to have the controversy heard as a matter of right. Such is indisputably the basic, if sometimes inarticulate, major premise underlying the decision of every case decided by this Court from *Chisholm v. Georgia* to *Massachusetts v. Missouri*.[40] Were this not so, much effort, paper and printers' ink have been unnecessarily used in the Supreme Court Reports on frequently lengthy opinions demonstrating an absence of jurisdiction, or deciding cases that the Court was obviously loathe to decide,[41] when all of such cases could have been dismissed with a brief "Per curiam" that the Court did not choose to accept jurisdiction.[42] Quotations from cases decided during the

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[39]308 U. S. 1 (1939).

[40]It will serve no useful purpose to collect all of the cases in which the original jurisdiction of the Supreme Court has been invoked. Most of them are collected in Hughes, *Federal Jurisdiction*, Chapter 68.

[41]I. e. *Oklahoma v. Cook*, 304, U. S. 387 at 396 (1937).

[42]There is almost always another forum, particularly in suits by Ambassadors, Ministers, Consuls and by States against Citizens of other States. Georgia *could* have sued the Tennessee Copper Co., in Tennessee, as certainly could Ohio have sued the Chattanooga Boiler & Tank Co. [*Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439 (1933)] Indeed, the complaint and reason for exercising equitable jurisdiction in *Florida v. Anderson*, 91 U. S. 667 (1875) was that there were too many *fori* other than the Supreme Court. So too Missouri and Wisconsin presumably *could* have enjoined the Sanitary District of Chicago in an Illinois Court [Missouri *v. Illinois*, 180 U. S. 208 (1901); *Wisconsin v. Illinois*, 281 U. S. 179 (1930)], and New York, the Passaic Valley Sewerage Commission in a New Jersey Court [*New York v. New Jersey*, 256 U. S. 296 (1921)], as the judges of state courts are bound to apply the law of the Constitution as well as Federal Judges. U. S. Constitution, Article VII., Section 2.

one hundred and sixty-one years of the Courts' existence, both on the general proposition that courts cannot decline to exercise their constitutionally imposed jurisdiction,[43] and on the specific proposition that the original jurisdiction of the Supreme Court must be exercised by the Court when properly invoked by a State as a matter of right[44] could be multiplied—only a few are set out in the margin.

Indeed, the universal long acquiescence of the Supreme Court in the mandatory nature of its original jurisdiction —and the sudden claim of a discretion therein—is similar to the sudden attack on the power of the Supreme Court to enforce its decrees against states in *Virginia v. West Virginia.*[45] What the Court said there is fully applicable here:

> "The many cases in which such controversies between States have been decided in the exercise of original jurisdiction make this truth manifest. Nor is there room for contending to the contrary

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[43]For instance, ". . . this court cannot deny its jurisdiction in a case to which it is extended by the Constitution." *Minnesota v. Hichcock*, 185 U. S. 373, 384 (1902) See also *Cohens v. Virginia*, 6 Wall. 264, 404; Mr. Justice Blair in *Chisholm v. Georgia*, 2 Dall. 419, 451 (1793).

[44]See *United States v. Texas*, 143 U. S. 621 (1892), where the court said: "Such exclusive jurisdiction was given to this court because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. . . . The words, in the Constitution, 'in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff . . . it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court . . . are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States 'to *all* cases,' in law and equity . . . and confers upon this court original jurisdiction 'in *all* cases', 'in which a State shall be party', that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, *as well as in all cases in which a State may, of right, institute a suit in a court of the United States.*"

[45]222 U. S. 17 (1911).

> because, in all the cases cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. *This must be unless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute.*

The application of the principle of *Massachusetts v. Missouri* to the case at bar does just that. It throws into dispute a fundamental constitutional principle universally recognized and acted upon since the foundation of the Government by the Congress, the Courts and all of the States, and in so doing, violates the Constitution and deprives sovereign states of their constitutionally guaranteed right to resort to the Supreme Court.

IV. THE RULE OF *MASSACHUSETTS v. MISSOURI*

1. Not Applicable To This Case

Louisiana sincerely urges, not only that *Massachusetts v. Missouri* is not applicable to its controversy with Cummins, but that *Massachusetts v. Missouri*, properly understood, is entirely consistent with the jurisprudence concerning the original jurisdiction of the Supreme Court developed in *Chisholm v. Georgia* and followed through all subsequent cases. It is the dictum in the case about a general discretionary original jurisdiction, as applied so as to deny Louisiana leave to file the complaint in the present case, that Louisiana primarily complains of. A brief survey of the scope of the original jurisdiction of the Court will serve to illustrate both the consistency of the holding

in *Massachusetts v. Missouri* with other Supreme Court cases, and with § 233 of the Judicial Code, and the inapplicability of that case to the complaint proposed to be filed by Louisiana here.

It has always been recognized that the original jurisdiction of the Supreme Court did not, and was never intended to, apply in every conceivable type of case or controversy that could arise concerning ambassadors, ministers, consuls, and those to which a Sate may properly be a party. This is obvious from the very words of the Judiciary Act of 1789, section 13 of which limits the original jurisdiction of the Supreme Court in suits concerning States to "controversies of a civil nature." Similarly, with regard to ambassadors, ministers and consuls, the jurisdiction of the Court applies, not to all conceivable suits or proceedings, but only to such

> "suits or proceedings . . . as a court of law can have or exercise consistently with the law of nations."

Moreover, the original jurisdiction of the Supreme Court extends only, by the terms of the Constitution, to "cases and controversies" understood in the technical sense explained so elaborately in *Muskrat v. United States*[46] as justiciable controversies of a judiciary nature. Finally, except in cases in which the Constitution obviously means to change the law and create a new jurisdiction, such as in cases between States, it is clear that the original jurisdiction of the Supreme Court comprehends only traditionally justiciable controversies.[47] Thus, in *Chisholm v. Georgia*, Mr. Justice Iredell says:[48]

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[46]219 U. S. 346 (1911).
[47]See *Hans v. Louisiana*, 134 U. S. 1 (1890).
[48]2 Dall. at p. 437.

"If therefore, no new remedy be provided . . . and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown be be alone applicable. If it could, I think it is now maintainable here. If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the power of Congress to authorize such a one."

It is significant that when the Court exceeded, without express constitutional authority, the limits of traditionally justiciable controversies by permitting suits against States without their consent in *Chisholm v. Georgia*[49] the immediate result was an amendment to the Constitution delimiting its power. At any rate, since the adoption of the Eleventh Amendment, the Court has repeatedly held that its jurisdiction was limited to traditionally justiciable controversies—to controversies recognized and traditionally adjudicated at the Common Law.

Thus in *Cohens v. Virginia*[50] Chief Justice Marshall said:

"The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceeding clause, jurisdiction might

[49]XI Amendment.
[50]6 Wheat. 264, 399 (1821).

> be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a State and its citizens, and perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction."

while in *Wisconsin v. Pelican Ins. Co.*[51] the Court said:

> "The grant is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by the one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

and, more recently in the case of *Massachusetts v. Mellon*,[52] the Court observed that

> "The effect of this [Art. 3, § 2] is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party to a proceedings of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant. And it has long been recognized that the original jurisdiction of the Supreme Court does not extend to political controversies, which are traditionally non-justiciable controversies."[53]

Hence it is, that in all of the cases prior to *Massachusetts v. Missouri* in which the Supreme Court has denied

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[51] 127 U. S. 265, 289 (1888).
[52] 262 U. S. 447 (1923).
[53] *Georgia v. Stanton*, 6 Wall. 50 (1867); *Cherokee Nation v. Georgia*, 5 Pet. 16 (1831).

original jurisdiction, it has done so, not on the ground that its jurisdiction was discretionary with it, or a matter of grace, but because the proposed case was not one of a traditionally justiciable nature, and therefore did not properly fall within the grant of original jurisdiction to the Court,[54] or because it did not meet the other jurisdictional requirements set up in the Constitution.[55] On the other hand, in every case presenting a traditionally justiciable controversy, either between States, or by a State against a citizen of another State, in which the original jurisdiction of the Supreme Court has heretofore been invoked to protect the proprietary interests of the State, the Court has assumed jurisdiction and determined the case.[56]

The *holding* of the Court in *Massachusetts v. Missouri* fits precisely into this constitutionally sanctioned jurisdictional pattern, irrespective of the *language* asserting an extra-constitutional and newly-discovered discretion in the Court to exercise its original jurisdiction. The Court *held* that Massachusetts could not maintain an action in the

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[54]See *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Louisiana v. Texas*, 176 U. S. 1 (1900); *Principality of Monaco v. Mississippi*, 292 U. S. 313 (1936); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 (1888). Suits of a political nature are similarly non-justiciable. *Georgia v. Stanton*, 6 Wall. 50, 75-77 (1867); *Mississippi v. Johnson*, 4 Wall. 475 (1867), as is extradition. *Kentucky v. Dennison*, 24 How. 66 (1860). See also *Louisiana v. Texas*, 176 U. S. 1 (1900).

[55]*I. e.*, because the State instituting the suit was not the real party interest [*New York v. Louisiana, New Hampshire v. Louisiana*, 108 U. S. 76 (1883); *Oklahoma v. Cook*, 304 U. S. 387 (1937)]; because the joinder of indespensible parties would defeat jurisdiction [*New Mexico v. Lane*, 243 U. S. 52 (1917); *Pennsylvania v. Quicksilver Mining Co.*, 10 Wall. 553 (1871); *California v. Southern Pacific Co.*, 157 U. S. 229 (1895); *Minnesota v. Northern Securities Co.*, 184 U. S. 199 (1902)]; because a State's interest as *parens patriae* is not a property interest [*Louisiana v. Texas*, 176 U. S. 1 (1900)] etc.

[56]Citations will only be given to suits by States against citizens of other States. *Georgia v. Brailsford*, 2 Dall. 402, 445, 3 Dall. 1; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518 (1851); *Florida v. Anderson*, 91 U. S. 667 (1875); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439 (1933); *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907); *Alabama v. Burr*, 115 U. S. 413 (1885); *Missouri v. Holland*, 252 U. S. 416 (1920). See also the recent case of *Texas v. Florida*, 306 U. S. 398 (1939).

United States Supreme Court against citizens of Missouri to recover inheritance taxes claimed to be due under the law of Massachusetts. This is perfectly consistent with the long line of authorities declining jurisdiction of traditionally non-justiciable controversies.[57] The Court *said* that in declining jurisdiction it was exercising a discretion to withhold its original jurisdiction. This is utterly inconsistent with the One Hundred and Sixty-One Years of the history of the Supreme Court, with the Constitution, the Judiciary Act and the jurisprudence of the Court, and is *obiter dictum* by which the Court is not bound.[58]

Massachusetts v. Missouri is consistent with the authorities declining jurisdiction of traditionally non-justiciable claims because of the well recognized principle of law that the revenue acts of a State are generally not enforceable extra-territorially.[59] Indeed, that principle had already become established in the jurisprudence of the Supreme Court in *Wisconsin v. Pelican Insurance Co.*,[60] which was full authority for the decision in *Massachusetts v. Missouri*.[61]

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[57]See *supra* note 54.

[58]See Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399 at p. 401 on the effect of *obiter dictum*.

[59]See 3 Beale, *Conflicts of Laws* (1935) § 610.2, pp. 1635-38; *Restatement of Conflicts*, § 610; Freeze, *Extraterritorial Enforcement of Revenue Laws* [1938] 23 Wash. U. L. Q. 321. It is significant to notice that the suit in *The King of Spain v. Oliver*, 2 Wash. C. C. 429, Pet. C. C. 217, which was a suit to recover certain duties imposed by the revenue laws of Spain, was brought, not on the revenue laws themselves, but upon an alleged contract to pay them. The court found no contract, and dismissed the suit. It appeared quite clearly from the evidence, however, that dutiable shipments were made.

[60]127 U. S. 265 (1888) quoted *supra*.

[61]The establishment of this principle with regard to suits by States against individuals is not affected by the cases recognizing jurisdiction in a suit between States over inheritance tax claims, i. e., *Texas v. Florida*, 306 U. S. 398 (1939). In such cases the jurisdiction of the court is justified on well recognized principles of international law.

In *Louisiana v. Cummins*, the case at bar, however, quite to the contrary, the claim is for the recission of a contract and for the recovery back by Louisiana of money out of which she alleges she was defrauded by the defendants—a claim traditionally justiciable since the Roman Law, well known and recognized at the time of the adoption of the Constitution,[62] and clearly contemplated by the judiciary articles of the Constitution as being a proper subject for the exercise of the original jurisdiction of the Supreme Court. It is therefore respectfully suggested that *Massachusetts v. Missouri* in no way controls the case at bar.

In the brief previously submitted to this Court Louisiana endeavored to point out to the Court that *Massachusetts v. Missouri* was distinguishable upon a number of other grounds—i. e., that this was a complaint in equity rather than an action at law, that the New York forum is inadequate, that Louisiana was not abusing its privilege of resorting to this Honorable Court and that the process of this Court was necessary for Louisiana's protection. Reference is made to that Brief for a discussion of those points.[63]

2 If Applicable, Then *Massachusetts v. Missouri* Should Be Overruled

In accordance with the rule of this Court announced in *West Coast Hotel Co. v. Parrish*,[64] Louisiana has included in its petition for a rehearing a prayer that *Massachusetts v. Missouri* be overruled if it is found to be con-

[62]See *The Federalist* #80, quoted in Louisiana's *Reply Brief*, p. 41, Note 105.

[63]Louisiana's Reply Brief, pp. 38 *seq.*; 42, 46.

[64]300 U. S. 379 (1937). *Cf. Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936).

trolling of the decision of this Court in the instant case. The considerations upon which this suggestion that *Massachusetts v. Missouri* should be overruled, in so far as it decides that the original jurisdiction of the Supreme Court in suits by States against citizens of other States is a matter of grace to be exercised within the sound discretion of this Court, is made have all been set out above. Briefly stated, such a doctrine is repugnant to the 161 years of history of the Supreme Court, to the Constitution and laws of the United States, and to the sovereignty of the States.

Moreover, it is apparent that the doctrine announced in the *Missouri* case of a discretionary original jurisdiction is based upon a faulty analysis both of the original jurisdiction of the Supreme Court and of the well known doctrine of private international law of *forum non conveniens.*[65] The Court apparently adopted the argument of counsel on this aspect of the case as reported in 308 U. S., pp. 10-13. It will be observed that counsel constantly refers to the Court as having "read into the constitutional provision," and as having "grafted a further exception upon the exception" as restrictions on the exercise of the Court's original jurisdiction not contemplated by the Constitution. Indeed, counsel's whole argument seems to be that because, to his mind the Court has violated the Constitution a number of times in the past, the Court should violate it again to assert a discretionary original jurisdiction. But the foregoing analysis in this Brief has shown that what counsel refers to as "grafting exceptions" and "reading in" is really a consistent progressive development of constitutional principles, expressing unity within the constitutional scheme, which does not, however, permit a

[65]See Blair, *The Doctrine of Forum Non-Conveniens in Anglo-American Law* [1929] 29 Columbia L. Rev. 1.

repudiation of the whole idea of "jurisdiction" which a discretion implies. And moreover, even accepting counsel's argument as true, the *Tompkins* case dispells any idea that simply because the Court has pursued an unconstitutional course (as Mr. Justice Brandis put it) even a hundred times in the past, that it will continue to exceed its authority,[66] let alone be led into an even less constitutionally justifiable position.

Again, the assertion of a discretionary original jurisdiction seems based upon a misconception of the basis of the doctrine of *forum non conveniens.* The Harvard Law Review has aptly observed that the application of the doctrine in *Massachusetts v. Missouri* is "unusual" in that the convenience of the court, rather than of the litigants, is the criterion.[67] It should be pointed out, moreover, that this is exclusively a doctrine of private international law, and not one applicable to the *lex fori;* that it applies exclusively to cases where either all parties, or at least one, are foreigners, or where the cause of action arose beyond the jurisdiction of the Court, and where the inconvenience of being tried in a foreign court will work hardship on the parties.[68] As pointed out by a British writer on the subject:[69]

> "The court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship, and this must be regarded as a condition *sine qua non* . . .

[66] *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1937).
[67] Note [1939] 53 Harvard L. Rev. 679.
[68] See 29 Columbia L. Rev. 1.
[69] Gibb, International Law of Jurisdiction (1926) 212.

> For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent."

Indeed in the cases relied on by the court in *Massachusetts v. Missouri* these conditions were present. *Canada Mining Co. v. Paterson*[70] was a libel proceedings all the parties to which were citizens of Canada. *Rogers v. Guaranty Trust Co.*[71] was a proceeding in a Federal Court in New York against a New Jersey corporation and a large number of directors and shareholders, a negligible number of whom were within the jurisdiction of the Court. In both cases, the Court referred the litigants to their proper forum. In the instant case, however, the United States Supreme Court is the forum of all parties—its jurisdiction and process runs to all parties alike, and the defendants have suggested no inconvenience that they will suffer if required to proceed before the Supreme Court. Indeed, every consideration of convenience, as pointed out earlier, both for complaintant and respondent, indicates this as the proper court in which to proceed. Hence the authorities relied upon by the Court in the *Mssouri* case do not support the claim to a discretionary exercise of the Court's original jurisdiction on any hitherto recognized principle of law.

Finally, the Court in *Massachusetts v .Missouri*, and in the instant case, indicates that "there is no want of another suitable forum." But it would seem that the Constitution had pre-judged this to the contrary on the basis of well known considerations, by establishing original jurisdiction in the Supreme Court. It will be pointed out later that the only other *fori* open to Louisiana is to proceed in

[70] 285 U. S. 413 (1929).
[71] 288 U. S. 123 (1932).

those of the States of New York, California and New Jersey. It is clear that

> "The object of vesting in the Courts of the United States jurisdiction of a suit by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist No. 80; Chief Justice Jay in *Chisholm v. Georgia*, 2 Dall. 4-19, 475, Storey on the Constitution, §§ 1638, 1682."[72]

Thus it seems that the exercise of a discretion by the Supreme Court to force Louisiana into the courts of New York completely defeats the universally recognized constitutional purpose of vesting original jurisdiction in the Supreme Court, and the provision of the Constitution itself. It is therefore respectfully suggested that *Massachusetts v. Missouri*, to this extent, be overruled.

V. THE EFFECTS OF A DISCRETIONARY ORIGINAL JURISDICTION

As pointed out by respondents[73] Mr. Justice Frankfurter recently said[74] that

> "in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate . . . potential abuses to which the doctrine is not unlikely to give rise."

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[72] *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289 (1888).
[73] Shushan Brief, p. 13.
[74] *Texas v. Florida*, 306 U. S. 398, 434 (1939).

An immediate effect of an exercise of discretion by this Court to refuse to hear Louisiana's claim against Cummins will be to completely deprive Louisiana of any right to sue in a federal court and to force Louisiana either to sue the defendants in at least one, perhaps three,[75] State Courts, or to abandon her claim against them altogether. This is so, because Congress has not granted any inferior federal court jurisdiction of suits by States where no federal question is involved, undoubtedly on the theory that States had recourse to the Supreme Court.[76] This completely defeats the purpose of the judiciary article of the Constitution, and places sovereign states in a worse position than private citizens and creatures of states—i.e. corporations—who can in similar circumstances invoke the diversity of citizenship jurisdiction.[77] This is indeed an anamolous situation.

On the other hand, ambassadors and other public ministers, their domestics and domestic servants are sueable only in the Supreme Court.[78] A discretionary jurisdiction thus places creditors of this class of persons at the absolute mercy of the Courts' discretion for the enforcement of their claims, unless it be said that Congress can impose jurisdiction on the Supreme Court only by withdrawing it from all other courts—a left-handed method of legislation at best.

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[75]Cummins is a citizen of California; Birch of New York, and the two corporations were domiciled in New Jersey. At the time the bill was originally filed, all were residents or doing business in New York, but there is no guarantee that they will remain so conveniently grouped for purposes of suit.

[76]*Wisconsin v. Duluth*, 2 Dill. 406, Fed. Cas. #17902 (1872); Hughes, *Federal Jurisdiction*, § 3027. See *Ames v. Kansas*, 111 U. S. 449 (1884).

[77]A state is not a citizen, and hence does not come under that head of jurisdiction. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511 (1898); *Highway Commission v. Utah Construction Co.*, 278 U. S. 194 (1929), nor can a case be removed to the Federal court for diversity. *Stone v. South Carolina*, 117 U. S. 430 (1886); *Postal Tel. Co. v. Ala.*, 155 U. S. 482 (1894).

[78]U. S. C. § 341.

Similarly, states in issuing bonds frequently waive their immunity from suit. In such case, should another state become the owner of such bonds,[79] it would be in a much less advantageous position than an individual owner, as the individual could enforce the bonds as of right in the courts of the state, while the state owner would have to depend upon the grace of the Supreme Court to permit suit to be filed, as the jurisdiction of the Supreme Court is exclusive in suits between States.[80]

Again, the purpose of the judiciary article and act, as intended by the fraimers, was to give Ambassadors, Ministers and States in bringing suits[81] a choice as to where to bring them,[82] while the effect of the Court exercising a discretion to deny jurisdiction "where there is no want of another suitable forum" is both to oust them from the federal courts and to restrict them to suits in state courts. Truly the doctrine of a discretionary original jurisdiction in the Supreme Court has made a veritable *"Through the Looking-glass"* world out of the Judiciary Articles of the Constitution. Everything works backwards! What was intended as a favor is turned into a burden. What was intended to give the parties a choice results in giving them no voice in the matter, and all of the choice to the Court. The Act that was designed to give them recourse to the federal judiciary ends up in forcing them to accept the state judiciary. And the only practical method by which Congress can vest original jurisdiction in the Supreme Court, if indeed it can at all, is by withdrawing it from every other court. Such a system can not have been the intention either

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[79]See *South Dakota v. North Carolina*, 192 U. S. 286 (1904).
[80]U. S. C. § 341.
[81]Except against other states.
[82]See Hughes, *Federal Jurisdiction*, § 3027.

of the Founding Fathers, the Constitution, the Congress or the Court.

VI. CONCLUSION

Counsel regrets the length to which this brief has grown, but, in view of the importance and public nature of the issue involved, wished to place before the Court all of the considerations and all of the available material for its final decision. The right granted by the Constitution and the Judiciary Acts to the States as a part of the fundamental laws to invoke the original jurisdiction of the Supreme Court is a valuable sovereign right of all of the States. The fact that it has been exercised but sparingly does not detract, but rather enhances its importance.

This Court has said only a few months ago in the *Classic* case[83] that

> "To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissable meanings of its words which, in the circumstances of their application, will effectuate those purposes."

Much of the material set out above has been in an effort to discover the purpose of the framers. It seems to be abundantly clear that it was their purpose to impose a mandatory original jurisdiction on the Supreme Court in the instances enumerated. And when the judiciary provisions are read in their historical setting, with the notes of the Convention, the speeches in the State legislatures, the writing of the Federalist and the decisions of the early

[83] *United States v. Classic*, 61 Sup. Ct. 1031, 1039 (1941).

Court in view, any doubt that such jurisdiction was mandatory disappears. Indeed, it does not appear that any responsible person even suggested a discretionary original jurisdiction in the Court before *Massachusetts v. Missouri*, although, as pointed out, there was some question of placing a discretion in Congress.

At this point it may be well to call the attention of the Court to the impressions of a keen observer of American institutions on the original jurisdiction of this Court. The celebrated de Tocqueville observed that[84]

> "When the two parties [before the Supreme Court] are not private individuals, but States, an important political consideration is added . . . The quality of the parties, in this case, gives a national importance to all their disputes; and the most trifling litigation of the states may be said to involve the peace of the whole Union."

Such were the motives that prompted the Founding Fathers to give States recourse to the original jurisdiction of the highest and most respected Court of the Union in the first instance—the peace of the whole Union. Indeed, there is a not inconsiderable opinion that the original jurisdiction of the Supreme Court is already too restricted by narrow interpretation adequately to serve the purposes of the framers,[85] and there is question as to whether matters of great public concern, such as the constitutional propriety of the method of regulation of the bituminous coal resources of the Nation, may not better and more fully be presented to the Court by States representing the public

[84] *Democracy in America* (Reeves Transl. 1877) vol. 1, chap. 8, p. 15.
[85] Heady, *Suits by States within the Original Jurisdiction of the Supreme Court* [1940] 26 Wash. U. L. Q. 61.

interest, than by questionable "controversies" between private litigants such as Mr. Carter against Mr. Carter's Coal Co.[86] But even so, it would be tragedy were the Court, through the medium of "discretion," to brush this responsibility completely aside for "considerations of convenience, efficiency and justice" to clear the docket of the Court for the appellate cases of mere private litigants.

Respectfully submitted,

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[86]See *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936) and *cf. Pennsylvania v. West Virginia*, 262 U. S. 553 (1923). See Hamilton and Adair, *The Power to Govern* (1933). Chapter 1, See also 50 Stat. 751 providing for at least some public representation in private litigation involving the constitutionality of legislation of public interest.